A-1

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

AQUATIC TECHNICAL SERVICES, INC.,
Petitioner,

v.

COUNTY OF NASSAU, NASSAU
COUNTY POLICE DEPARTMENT
SAMUEL ROZZI, Commissioner
of Police, and FRANCIS T.
PURCELL, County Executive,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF NEW YORK

APPENDIX

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At a Trial Term, Part 24 of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Supreme Court Building, Mineola, New York, on the 15 day of September, 1981.

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AQUATIC TECHNICAL SERVICES, INC., 26 Bayside Drive, Point Lookout, N. Y.,

Plaintiff,

-against-

Index No. 10246/78

JUDGMENT

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, SAMUEL ROZZI, COMMISSIONER OF POLICE, and FRANCIS T. PURCELL, County Executive, 1 West Street, Mineola, New York,

Defendants.

----------X

The above entitled action, having come on for trial before MR. JUSTICE HOWARD E. LEVITT, without a jury, at a Trial Term, Part 24 of this Court, held at the Court House, Supreme Court Drive, Mineola, New York, and the plaintiff

having appeared by its attorneys, BANNO, LANDI & PAJION, ESQS., by Carl Banno, Esq., of Counsel, and the defendants having appeared by their attorney, EDWARD G. McCABE, County Attorney of Nassau County, by Joseph T. Carney, Deputy County Attorney, of Counsel, and upon the testimony and evidence adduced at the said trial, and after due deliberation thereon, and upon the Memorandum Decision of MR. JUSTICE HOWARD E. LEVITT, dated August 10, 1981.

NOW, on motion of EDWARD G. McCABE, County Attorney of Nassau County by JOSEPH T. CARNEY, Deputy County Attorney, of Counsel, it is hereby

ORDERED, ADJUDGED and DECREED, that the action is dismissed, and it is further,

ORDERED, ADJUDGED and DECREED, that the defendants, COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, SAMUEL ROZZI, Commissioner of Police, and FRANCIS T.

PURCELL, County Executive, residing at 1 West Street, Mineola, New York, have judgment against AQUATIC TECHNICAL SERVICES, INC., located at 26 Bayside Drive, Point Lookout, New York, in the amount of $150.00, for costs and disbursements in this action.

E N T E R,

/s/ HOWARD E. LEVITT

J.S.C.

MEMORANDUM

SUPREME COURT, NASSAU COUNTY

AQUATIC TECHNICAL SERVICES, INC., Plaintiff, VS. COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, SAMUEL ROZZI, Commissioner of Police and FRANCIS T. PURCELL, County Executive, Defendants.	TRIAL TERM PART 24 BY LEVITT, J. DATED August 10, 1981 Index No. 10246/78

Plaintiff, a private marine towing and salvage service, whose sole stockholder and operator (Robert S. Rickard) is the moving force in this proceeding, seeks an order of this Court permanently restraining and enjoining the defendants from pursuing distress towing assistance operations on the navigable waters of the County of Nassau. In addition, plaintiff seeks an order declaring the acts and policies of the defendant void, illegal and unconstitutional

pursuant to § 340 of the General Business Law, § 51 of the General Municipal Law, Article VIII § 1 and Article I § 7 of the Constitution of the State of New York and the Fourteenth Amendment of the United States Constitution.

The Marine Bureau of the defendant, Nassau County Police Department, is, hierarchically, a subdivision of the Traffic Services subdivision of the Patrol Division of the Office of the Chief of Patrol. "The Marine Bureau is responsible for the operation of boats on those navigable waters under the jurisdiction of the County of Nassau and is further charged with the protection of persons and property on and adjacent to said waterways, including islands therein, and the enforcement of all laws, regulations, and ordinances." (Rules and Regulations, Art. XII, Rule 4, § 3(d), Nassau County Police Department).

As stated above, plaintiff is in the business of marine towing and salvage, plying its trade on the navigable waters of the south shore of Long Island. The president and sole stockholder of the plaintiff corporation is in possession of the necessary license, issued by the United States Coast Guard, to operate such business.

It is plaintiff's position that when a member of the defendant's Marine Bureau, comes upon a distressed vessel in other than an "emergency" situation, those aboard such vessel should be advised to solicit assistance from a private towing company, such as the plaintiff; or, in the alternative, that the defendant directly notify a private towing company of the situation. This posture is based upon plaintiff's contention that the defendant is wasting taxpayer's funds by coming to the aid of every boat that requests aid and as a consequence

cannot allocate sufficient time to actual law enforcement, i.e., the issuance of summonses for speeding and other offenses. The result of defendant's concentration upon rescue operations, plaintiff believes, creates a towing monopoly for the defendant to the preclusion of the plaintiff (the only private tower presently contending for the trade).

Defendant takes the position that members of the Marine Bureau are mandated, as part of their police duties, to come to the aid of any vessel in distress, and/or the persons aboard such vessel; and that to limit their rescue activites to "emergency" situations would be totally impractical.

Throughout history there has been a duty, legal and moral, on boatmen to render aid to those in distress. Compliance with this duty has been encouraged by

systems of reward and punishment. As early as nine hundred years before the Christian era, a salvor of a distressed or wrecked ship was rewarded for his efforts through salvage awards (M. Norris, The Law of Salvage, § 5 (1958)). "The maritime law, for the purpose of public policy and for the advantage of trade, imposes a liability upon the thing saved; a liability which is a special consequence arising out of the character of mercantile enterprise, the nature of the sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything, except ships or goods in peril at sea." (Falcke v. The Scottish Imperial Insurance Co., 34 Ch. D. 234, at 248).

Plaintiff chose to embark upon a commercial enterprise for the rendering of

assistance in a field which historically has placed a moral and legal duty upon every boat person to render assistance, with or without compensation. In the United States, as early as 1912, there was a statutory duty for the master or person in charge of a vessel to render assistance to every person found at sea in danger of being lost, and "if he fails to do so, he shall upon conviction be liable to a penalty of not exceeding $1,000.00 or imprisonment for a term not exceeding two years, or both." (Salvage Act of 1912, 46 USC 728). To date, however, prosecution has been non-existent under this Act. Thus, the master or person in charge of a vessel may escape the duty of aiding fellow boat persons without fear of statutory penalties. The relative mildness of the penalties and the fact there are no prosecutions recorded to date seems to suggest that the duty on the

part of fellow pleasure boaters is discreetly overlooked when upon the high seas or in territorial waters (2 California Western International Law Journal (1971).

The specific rules and regulations cited earlier are not the exclusive basis for defendant's pleasure boat distress towing operations. Under New York law, "it shall be the duty of every master or pilot of any vessel [propelled by machinery] to render such assistance as he can possibly give to any other vessel coming under his observation and being in distress on account of accident, collision, or otherwise." (Navigation Law, Art. 4, § 41(3)). Also, Marine Bureau order number 5 issued on March 24, 1978 states in part:

> 1. Members of the Marine Bureau will strictly adhere to the policy of towing disabled vessels only as far as the nearest point of safety. A point of safety will be considered as any location where a telephone and a safe mooring

is available to the occupants of the vessel.

2. Any further assistance which is required will be the responsibility of the occupants of the vessel, either through commercial enterprise or other private arrangements. At no time, other than an extreme emergency situation, will a member of the Marine Bureau tow a disabled vessel beyond the nearest point of safety.

In addition, the preface to the Rules and Regulations of the Nassau County Police Department states that "written charges will be preferred against any member of the Police Department or Police Force who violates these Rules and Regulations, unless otherwise directed by the Commissioner of Police."

In the case at bar, defendant is under a statutory duty to render assistance in all circumstances within the parameters of its jurisdiction as well as those areas reasonably outside the jurisdiction, so far

as this can be done without serious danger to its own vessels or crews. Furthermore, the defendant's personnel are restricted, unlike other boat persons, to bring the disabled vessel only as far as "the nearest point of safety," except where such nearest point would force the disabled vessel to confront further marine peril.

Plaintiff's contention that defendant's Marine Bureau should aid vessels only under emergency situations is implausible. This Court finds that there is a high probability that boat persons might not aid fellow boat persons in distress; thus, defendant's Marine Bureau, provides a necessary function upon the jurisdictional waters of Nassau County. Furthermore, plaintiff's demand for defendant to act only in emergency situations is an amorphous limitation that cannot be judicially mandated. There is no rational basis for distinguishing

between an emergency situation and a non-emergency situation. An emergency situation is defined in New York Jurisprudence Words and Phrases 237, as "unforeseen occurrences or conditions," a definition as indefinite as the term itself.

In The Mira A. Platt, 31 F. 572 (1887), the Court determined that a distress signal of any kind, including the mere waving of a hand, is usually regarded as indicating the state of mind of those on board the vessel and their apprehensiveness with respect to the unsafe condition of their vessel. Such a signal of distress is sufficient cause for other boat persons, including the defendant, to deem the vessel in peril.

Further, if there is an inability to navigate or control the direction of a vessel, due to machinery failure or other damage taking place at sea or away from a safe area, it will place the vessel in

greater peril. A drifting vessel is a menace to navigation and to herself. If allowed to drift, a disabled vessel may eventually meet with disaster by washing up on a beach, shoal, rocks, breakwater, etc., or come into collision with another vessel or stationary object. Should a squall or storm arise (and such can occur instantaneously) there is always the added likelihood of the vessel receiving serious damage, if not total loss, by capsizing or sinking.

The responsibility of aiding a distressed vessel applies to all persons in control of any type of vessel. Such is necessary to provide a larger, more meaningful scope to the duty. If the responsibility were to be interpreted to apply only to commercial towing vessels or only to those situations coming within an artificially defined standard of "emergency," individuals owing [sic] pleasure craft would most often

not only be relieved of the duty to their fellow boat persons but would themselves be placed in greater jeopardy. Defendant, by expressly limiting its responsibilities to towing to the nearest point of safety, has given plaintiff the opportunity of performing its proper function of serving the convenience of boaters.

The Court finds that defendant's Marine Bureau, through its personnel, is fully complying with its legal and moral duties in the maritime community without recourse to monetary reward. Plaintiff, however, has failed to show how the maritime community and the public at large would benefit from a determination by this Court that in towing pleasure boats in distress the defendant's Marine Bureau does not serve a necessary function upon the navigable waters of Nassau County and that the Marine Bureau should, thus, be enjoined from such functions.

Further, it was not able to show how it could itself assure the maritime community that all required assistance would be rendered in the absence of the distress services performed by the defendant.

Plaintiff also relies upon the fourteenth amendment to the United States Constitution and Article I § 7 of the New York State Constitution, contending that the defendants took its private property without just compensation.

In Story v. New York El.R.Co., 90 NY 122, 168, the Court held that to constitute a taking, "it is sufficient that the person claiming compensation has some right or privilege, secured by grant, in the property appropriated to the public use, which right or privilege is destroyed, injured, or abridged by such appropriation." In the case at bar, the plaintiff did not demonstrate a right or privilege in the property.

Potential profit from towing is not property. Thus, it cannot be determined that a property right or privilege was destroyed, injured, or abridged. Furthermore, as held in Rose v. State of New York, 24 NY 2d 80, 87, just compensation "is properly measured by" assessing the actual loss to the owner of the real property. Mere personalty, as in the instant case, is not compensable upon appropriation (City of Buffalo v. J. W. Clement Co., 28 NY 2d 241). Thus, even if plaintiff suffered damage due to the loss of prospective business, such possible future loss of prospective business is not a "taking" in a constitutional sense.

The plaintiff further relies upon the New York State Constitution, Article VIII § 1 contending that free towing and salvage by the defendants constitutes a gift or loan of property to and in aid of individual boat owners. This contention lacks merit.

In Hess v. Board of Educ. of Cent. Sch. Dist. No. 1 of Townships [sic] of Liberty, 41 AD2d 151, it was held that an expenditure of public funds is constitutionally prohibited absent an express statutory provision to the contrary. In this case the express statutory provision is contained in the Navigation Law, Article 4, § 41(3), which places a duty upon every sailor to render aid, if possible, to any other vessel propelled by machinery observed and being in distress.

Plaintiff additionally claims that the defendants have maliciously and unlawfully entered into an agreement, combination, and conspiracy in violation of § 340 of the General Business Law, to prevent the plaintiff from carrying on its business of providing towing and salvage services, for the purpose of damaging plaintiff in its business and forcing its customers and

potential customers to use the free services of the defendants all with the intent to infringe upon and destroy the business of the plaintiff.

This claim must fail. No evidence was presented by the plaintiff to prove that the defendants' actions have been other than in compliance with federal and state statutory duties or their municipal police duties.

Finally, the plaintiff argues that the defendants are in violation of § 51 of the General Municipal Law (Prosecution of officers for illegal acts) in that the free towing and salvage is unnecessary, superfluous, illegal and a waste of taxpayer's money; and that commercial salvors are ready and available to all boaters to provide quick, safe and efficient services.

Under this statute, a taxpayer is required to show public injury in order to have standing (Bloom v. Mayor of City of

New York, 28 NY 2d 952). Furthermore, a taxpayer's action may only be maintained to prevent waste or to prevent an illegal act (Campbell v. City of New York, 244 NY 317). The plaintiff herein seeks to enjoin the defendants from conducting distress towing assistance operations on the navigable waters within the jurisdiction of Nassau County. However, the plaintiff has failed to show any public injury. A taxpayer's action to prevent waste by showing that there was public injury rather than direct injury solely to the plaintiff is the proper action to be pursued.

CONCLUSION

The acts of the defendants claimed to be illegal, i.e. towing of boats in distress, are authorized by statute and encouraged under the Maritime Law. If, however, employees of the defendants in individual

instances tow boats further than the nearest point of safety, there is a remedy through disciplinary action as set forth in the rules and regulations of the Nassau County Police Department.

The defendant's Marine Bureau, should not be required to predetermine whether a distress situation constitutes an existing or potential emergency and to evaluate whether it may possibly be exposing public funds to waste by not contacting a private salvage or towing company. Any delay may prove fatal to a distressed vessel.

> "Never trust her at anytime,
> when the calm sea shows her
> false alluring smile." -
> Titus Lucretius Carus
> 99-55 B.C. [DeRerum Natura
> (On the Nature of Things)
> Bk. I, 1.1 (Invocation)]

Accordingly, plaintiff's complaint is dismissed in its entirety.

The foregoing constitutes the decision of this Court pursuant to CPLR 4213.

Settle judgment.

/s/ Howard E. Levitt
J. S. C.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on August 2, 1982

HON. VINCENT D. DAMIANI, Justice Presiding,
HON. FRANK D. O'CONNOR,)
HON. WILLIAM C. THOMPSON,) Associate
HON. RICHARD A. BROWN.) Justices

Aquatic Technical Services, Inc., Appellant, v. County of Nassau et al., Respondents.	Order on Appeal from Judgment Civil Action or Proceeding

In the above entitled cause, the above named Aquatic Technical Services, Inc., plaintiff, having appealed to this court from a judgment of the Supreme Court, Nassau County, dated September 15, 1981; and the said appeal having been argued by Carl C. Banno, Esq., of counsel for the appellant, and argued by Kathryn Driscoll Hopkins Esq., of counsel for the respondent,

and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, with cost for reasons stated in the opinion of Justice LEVITT at Trial Term.

Enter:

IRVING N. SELKIN

Clerk of the
Appellate Division

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held
at Court of Appeals Hall
in the City of Albany on
the sixteenth day of
November A.D. 1982

PRESENT, HON. LAWRENCE H. COOKE, Chief
Judge, presiding.

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2 Mo. No. 1177 SSD 134

Aquatic Technical Services, Inc.,

Appellant,

vs.

County of Nassau, Nassau County
Police Department, et al.,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground

that no substantial constitutional question is directly involved.

/s/ Joseph W. Bellacosa

Joseph W. Bellacosa
Clerk of the Court